

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 8, 2012

v

JERMAINE ARNAEZ COOPER,

Defendant-Appellant.

No. 298790
Wayne Circuit Court
LC No. 09-027958-FC

Before: OWENS, P.J., and JANSEN and MARKEY, JJ.

PER CURIAM.

Defendant appeals by right his bench-trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84, for which he was sentenced as a fourth habitual offender, MCL 769.12, to a prison term of 134 months to 22 years. We affirm.

I. FACTS AND PROCEEDINGS

Defendant's conviction arises from an assault of Terence Thompson at a gas station in Detroit where Thompson worked. Defendant and codefendant Osie Moore were both charged in the offense, which was recorded on a security video system. The video shows that defendant and Moore both attacked Thompson and threw him to the floor, after which they both repeatedly kicked him to the point of apparent unconsciousness. Although the video shows, and the trial court found, that Moore was the more violent of the two offenders, defendant can be seen kicking Thompson several times in the head with substantial force. In addition, after a period during which Moore continued the assault by himself, defendant returned and kicked Thompson again near his head or abdomen, after which defendant and Moore dragged Thompson outside the gas station. Thompson did not testify at trial, and the parties stipulated that he had no memory of the incident. The trial court acquitted defendant of an original charge of assault with intent to commit murder, but found him guilty of assault with intent to do great bodily harm less than murder.

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence was insufficient to support his conviction of assault with intent to do great bodily harm. We review the evidence "de novo and in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Sherman-*

Huffman, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39 (2002). “Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime.” *People v Truong*, 218 Mich App 325, 337; 553 NW2d 692 (1996) (citation omitted).

The elements of assault with intent to do great bodily harm are: (1) an attempt or threat with force or violence to do corporal harm to another, and (2) an intent to do great bodily harm less than murder. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). The second element requires proof of specific intent, as opposed to general intent. *Id.*; *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). “[T]he distinction between specific intent and general intent crimes is that the former involve a particular criminal intent beyond the act done, while the latter involve merely the intent to do the physical act.” *People v Beaudin*, 417 Mich 570, 573-574; 339 NW2d 461 (1983). “This Court has defined the intent to do great bodily harm as ‘an intent to do serious injury of an aggravated nature.’” *Brown*, 267 Mich App at 147, quoting *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986).

At trial, the prosecutor argued that defendant was directly involved as a principal in the offense, and also aided and abetted Moore in assaulting Thompson. “A person who aids or abets the commission of a crime may be convicted as if he directly committed the crime.” *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001); see also MCL 767.39. To obtain a conviction under an aiding and abetting theory, the prosecutor must prove:

“(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.” [*People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (citation omitted).]

An aider and abettor’s state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, the defendant’s participation in planning or executing the crime, and evidence of flight after the crime. *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999). “[B]ecause it can be difficult to prove a defendant’s state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant’s state of mind, which can be inferred from all the evidence presented.” *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

The evidence was sufficient to enable the trial court to find that defendant acted with the specific intent to inflict great bodily harm on Thompson. The security video depicts defendant forcefully kicking Thompson several times in or near his head while Thompson was lying on the floor. The forcefulness of defendant’s kicks and the fact that the kicks were targeted at Thompson’s head supports the trial court’s finding that defendant intended for Thompson to sustain serious injury of an aggravated nature. Further, defendant participated in the offense along with codefendant Moore, who also forcefully kicked and stomped on Thompson while Thompson was lying on the floor. Defendant did not participate in the assault to the same extent as Moore. But after Thompson was severely beaten and was lying motionless on the floor, and after Moore continued to forcefully kick him, defendant rejoined the assault and gave Thompson

an additional kick near his head or abdomen. Defendant's participation in the assault with codefendant Moore, and his rejoinder after observing the ferocity of Moore's continuous attack, supports an inference that defendant and Moore were acting in concert, and that defendant aided and abetted Moore with knowledge of Moore's intent to cause Thompson to sustain serious injury of an aggravated nature. We conclude that the evidence was sufficient to support defendant's conviction of assault with intent to do great bodily harm less than murder.

III. DEFENDANT'S RIGHT TO BE PRESENT AND TO TESTIFY AT TRIAL

Defendant argues that the trial court violated his constitutional rights to attend trial and to testify on his own behalf when it allowed the parties to proceed with closing arguments after defendant failed to appear for trial for the second consecutive day. Defendant asserts that because he had waived a jury and there were no other witnesses who intended to testify, it would have been reasonable to adjourn the trial until he appeared and testified, rather than to proceed with closing arguments. Because defense counsel did not move for an adjournment of trial after defendant failed to appear for the second consecutive day, and counsel did not otherwise object to proceeding with closing arguments, we conclude that this issue is unpreserved. Our review is therefore limited to plain error affecting defendant's substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

A defendant's right to be present at his felony trial is guaranteed by statute, MCL 768.3, and by the Sixth Amendment, *People v Staffney*, 187 Mich App 660, 663; 468 NW2d 238 (1990); see also *Illinois v Allen*, 397 US 337; 90 S Ct 1057; 25 L Ed 2d 353 (1970). However, "a defendant may waive both his statutory and constitutional right to be present during trial . . . through failure to appear for trial." *People v Gross*, 118 Mich App 161, 164, 166; 324 NW2d 557 (1982). A defendant's right to testify on his own behalf is similarly guaranteed by the Constitution. *Rock v Arkansas*, 483 US 44, 51-52; 107 S Ct 2704; 97 L Ed 2d 37 (1987); *People v Solomon*, 220 Mich App 527, 533; 560 NW2d 651 (1996). Again, however, that right is "not without limitation" and may "bow to accommodate other legitimate interests in the criminal trial process." *Id.* at 534, quoting *Rock*, 483 US at 55.

In this case, defendant failed to appear when trial resumed on Monday, May 3. The trial court agreed to adjourn the trial for one day after defense counsel advised the court that defendant's absence might be attributable to his mother's hospitalization. However, defendant also failed to appear the next day, May 4, this time without any explanation. The trial court inquired of defendant's girlfriend and defense counsel, but neither knew why defendant was not present or when he would be available. After defense counsel informed the court that he had no other witnesses, the court directed the attorneys to present their closing arguments.

Although defendant contends that an additional day's delay would not have unduly burdened the administration of justice because he was being tried by the court and not a jury, and because there were no other witnesses left to testify, the efficient management of judicial resources is a legitimate concern regardless of whether witnesses or jurors would be affected. In addition, the trial court had already adjourned trial once to give defendant an additional day to appear, but he failed to do so. No explanation was given when defendant failed to appear for the second consecutive day, and defendant had not provided any information indicating when he intended to return. This case is clearly distinguishable from *Solomon*, 220 Mich App at 532-533,

in which the defendant was available to testify only half an hour after proofs were closed. Here, in the absence of any explanation for defendant's continued absence from trial for the second consecutive day, or any indication of when he might return or become available, the trial court's decision to continue with the trial by proceeding to closing arguments was not plainly erroneous. See *Gross*, 118 Mich App at 165-166.

In a supplemental brief filed *in propria persona*, defendant asserts that the trial court was required to personally obtain a formal waiver from him before proceeding with the trial in his absence. We disagree. As previously indicated, a defendant may waive his right to be present at trial through his own failure to appear. *Id.* at 164; see also *People v Swan*, 394 Mich 451, 452; 231 NW2d 651 (1975) (noting that “[a] defendant’s voluntary absence from the courtroom after trial has begun waives his right to be present and does not preclude the trial judge from proceeding with the trial to conclusion”). Because defendant was voluntarily absent from trial for two consecutive days, he waived his right to be present and the trial court did not err by proceeding with the trial to conclusion, even if that meant that defendant would not testify. A formal waiver of defendant’s right to be present and right to testify was not required.

IV. DEFENDANT’S SUPPLEMENTAL BRIEF

Defendant raises several additional issues in his supplemental brief filed *in propria persona*, none of which has merit.

A. EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

The record does not support defendant’s claims that he has been denied the effective assistance of appellate counsel. “[T]he test for ineffective assistance of appellate counsel is the same as that applicable to a claim of ineffective assistance of trial counsel.” *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008). To establish a claim of ineffective assistance of counsel, a defendant must show that (1) his counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel’s error, the outcome of the proceeding would have been different. *Id.* at 185. Defendant must also overcome a strong presumption that counsel’s performance constituted sound strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant first complains that appellate counsel’s decision to challenge defendant’s conviction of assault with intent to do great bodily harm less than murder was “frivolous” because appellate counsel inaccurately asserts that the trial court failed to find that defendant acted with the intent to inflict great bodily harm. Defendant has mischaracterized appellate counsel’s argument. Appellate counsel has not argued that the trial court failed to find the requisite intent to do great bodily harm, but rather argues that the *evidence was insufficient* to support the trial court’s finding that defendant possessed the requisite intent.

Defendant next complains that appellate counsel has inaccurately asserted that the claim of error raised in Issue II of defendant’s principal brief on appeal, relating to whether the trial court violated defendant’s right to be present at trial and to testify, was not preserved below. In support of his claim that this issue was properly preserved, defendant cites trial counsel’s

statements requesting an adjournment of trial on May 3, 2010. However, the trial court granted an adjournment of trial on May 3. The basis for Issue II in defendant's brief was the trial court's failure to further adjourn trial after defendant again failed to appear on May 4. Defendant contends that the issue was preserved by defense counsel's statement on May 4 advising the trial court that "it was time for [defendant] to testify because he advised me that he wanted to testify on his own behalf." However, that statement merely referred to the purpose of the prior adjournment; it did not involve either a request for a second adjournment or any objection to the trial court's decision to proceed with closing arguments in defendant's absence. The quoted statement does not support defendant's claim that appellate counsel incorrectly determined that the issue was not preserved. Rather, as we previously indicated, because defense counsel did not move for an adjournment of trial, and did not object to proceeding with closing arguments after defendant failed to appear for the second consecutive day, the issue was not preserved below, as properly represented in the brief filed by appellate counsel.

Defendant also asserts that appellate counsel falsely advised him that he could not discharge appellate counsel. However, defendant has not identified any record support for this claim, such as a letter from appellate counsel containing the allegedly improper advice or an affidavit from defendant setting forth counsel's allegedly improper advice. Regardless, defendant cannot establish that he was prejudiced by counsel's alleged advice. The record discloses that in response to a request by defendant, this Court sent defendant a letter advising him that a request for the appointment of substitute counsel should be submitted to the trial court, which retained jurisdiction to appoint substitute counsel while this appeal was pending. There is no evidence that defendant ever filed a request for substitute counsel with the trial court. Because defendant was advised of the proper procedure for requesting substitute appellate counsel, he cannot establish that he was prejudiced by counsel's allegedly improper advice.

B. ADMISSION OF MEDICAL RECORDS AND PRODUCTION OF WITNESSES

Defendant argues that his constitutional right to confront witnesses was violated by the admission of Thompson's medical records, without producing either Thompson or his treating physician, D. John Webber, at trial. However, the parties expressly stipulated to the admission of Thompson's medical records. Defense counsel's express agreement that the medical records could be admitted waived any claim that admission of the records would violate defendant's Sixth Amendment right of confrontation. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001). A waiver extinguishes any error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). Further, the trial court was not required to obtain defendant's personal consent to the admission of the medical records. "While the defendant must personally make an informed waiver for certain fundamental rights such as the right to counsel or the right to plead not guilty, for other rights, waiver may be effected by action of counsel." *Id.* at 218. A defense attorney's decisions pertaining to the conduct of trial, including "what arguments to pursue, . . . what evidentiary objections to raise, . . . and what agreements to conclude regarding the admission of evidence" are binding on the defendant. *Id.*; see also *New York v Hill*, 528 US 110, 114-115; 120 S Ct 659; 145 L Ed 2d 560 (2000). Defense counsel's stipulation concerning the admission of the medical records was binding on defendant.

Defendant also contends that the prosecutor had a duty under MCL 767.40a to produce Thompson and Dr. Webber at trial. Defendant did not object to the nonproduction of these

witnesses, leaving this issue unpreserved. Therefore, defendant has the burden of showing a plain error affecting his substantial rights. *People v Fackelman*, 489 Mich 515, 537; 802 NW2d 552 (2011). Defendant's argument is misplaced because it is based on the version of MCL 767.40a that was in effect before it was amended in 1986. Under the current statute, the prosecutor's former duty to locate and produce all res gestae witnesses at trial, known or unknown, has been replaced with a duty to notify a defendant of all known res gestae witnesses, and all witnesses whom the prosecutor intends to produce at trial. MCL 767.40a; *People v Cook*, 266 Mich App 290, 295; 702 NW2d 613 (2005). The record contains a copy of the prosecutor's witness list; neither Thompson nor Dr. Webber was identified as a witness that the prosecutor intended to call at trial. Therefore, the prosecutor was not under any duty to produce either Thompson or Dr. Webber at trial. Defendant has shown no plain error.

To the extent defendant argues that he never properly waived the production of Thompson and Dr. Webber as witnesses, his argument is misguided. There was no attempt to waive the production of either witness and, as previously explained, none was required because the prosecutor was not under a duty to produce either witness for trial. Nothing prevented defendant from calling and confronting either witness himself, but it appears from the record that defense counsel determined that the witnesses were not necessary. Furthermore, there is no basis to conclude that defendant's substantial rights were affected by the failure to call either Thompson or Dr. Webber. Given the stipulation that Thompson had no memory of the incident, there is no reason to believe that he could have provided any information about the assault. Dr. Webber was merely a treating physician, and there is no suggestion that the nature of Thompson's injuries were disputed or that the medical records did not accurately reflect his injuries. Defendant is not entitled to appellate relief in connection with this issue.

C. DURESS DEFENSE

Defendant next argues that he was denied the opportunity to present the affirmative defense of duress because of the trial court's failure to adjourn trial in order to permit him to testify. First, we note that the trial court never prevented defendant from presenting any defense or from testifying. Rather, as previously explained, the trial court properly proceeded with the trial in defendant's absence after defendant failed to appear for two consecutive days. It was defendant's voluntary absence from the trial, and not any decision by the trial court, that prevented defendant from offering testimony in support of a duress defense.

Second, to the extent that defendant argues that trial counsel was ineffective for failing to present a duress defense, the record does not factually support his claim. Because defendant did not raise an ineffective assistance of counsel claim in an appropriate motion in the trial court, appellate review of any such claim is limited to errors apparent from the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). "Ineffective assistance of counsel can take the form of a failure to call a witness or present other evidence only if the failure deprives the defendant of a substantial defense." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), mod 453 Mich 902 (1996); see also *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant argues that he could have presented a defense based on duress if he had been permitted to testify. But as previously explained, defendant's failure to testify was not attributable to any decision by defense counsel. Counsel expressed an intent to call defendant to testify, but defendant's absence prevented him from doing so. Therefore, counsel cannot be faulted for defendant's failure to testify. Further, although defendant claims that his testimony would have supported a duress defense, he has not submitted any offer of proof showing what testimony he would have provided, and the record does not otherwise contain support for a duress defense in this case.

In *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009), this Court explained that a defense of duress requires proof of four elements:

- A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
- B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
- C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
- D) The defendant committed the act to avoid the threatened harm.

“[T]he threatening conduct or compulsive act must be present, imminent, and impending.” *Id.* “[T]he defense reflects a social policy that it is better for a person to choose to commit a crime than to face a greater evil threatened by another person.” *Id.* at 372.

Defendant relies on the fact that Thompson was armed with a gun to argue that he could have presented a duress defense. At trial, the parties stipulated that a gun was found on Thompson's person when he arrived at the hospital. But there was no evidence that Thompson produced or used the gun before or during the assault, and the security video does not depict Thompson acting in a threatening manner before the assault. Further, the video shows that defendant and codefendant Moore continued to violently attack Thompson while he was lying defenseless on the floor, after losing consciousness. The record does not reveal, and defendant has not identified, any evidence indicating that he assaulted Thompson in response to threatened harm, or that his assaultive conduct was necessary to avoid any threatened harm. Because defendant has not established factual support for a duress defense, his claim that counsel was ineffective for failing to present such a defense cannot succeed.

D. ADDITIONAL INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Defendant next argues that defense counsel was ineffective for failing to protect defendant's right to confront his accusers. Defendant does not clearly explain the basis for this argument. To the extent the argument is directed at the admission of the medical records, defense counsel's decision to stipulate to the admission of the records was a strategic decision that was binding on defendant. “Absent a demonstration of ineffectiveness, counsel's word on such matters is the last.” *Carter*, 462 Mich at 218 (citation omitted). Defendant does not explain why counsel's decision to stipulate to the admission of the medical records should be

considered objectively unreasonable, or how he was prejudiced by the admission of the records. Defendant has not established that counsel was ineffective in this regard.

To the extent that defendant's argument is directed at the failure to produce or call Thompson or Dr. Webber as a witness at trial, defendant similarly has not demonstrated that trial counsel was ineffective. As previously indicated, the prosecution was not under a duty to produce either witness. Further, defense counsel's failure to call either witness would amount to ineffective assistance of counsel only if it deprived defendant of a substantial defense. *Julian*, 171 Mich App at 159. There is no indication that either witness could have offered testimony significantly probative of defendant's guilt or innocence. The parties stipulated that Thompson had no memory of the incident and defendant has not made any showing that this stipulation was inaccurate. Further, defendant has not submitted any offer of proof in support of any testimony that Thompson could have provided. Given the stipulation that Thompson had no memory of the assault, and in the absence of a record establishing how Thompson might have testified, there is no basis for concluding that trial counsel's failure to call Thompson as a witness was objectively unreasonable or deprived defendant of a substantial defense.

Similarly, the record does not support a conclusion that Dr. Webber's testimony would have been beneficial to defendant. The principal issue at trial was defendant's intent and state of mind during the assault. While the nature of Thompson's injuries was probative of defendant's intent, that information was provided through the medical records, which were admitted by stipulation. The nature of the injuries was not disputed such that Dr. Webber's testimony would have been necessary. Further, any probative value of Dr. Webber's medical testimony on the issue of intent was diminished by the availability of a security video that depicted the actual assault. Indeed, defense counsel may have concluded that Dr. Webber's testimony would be unfavorable to defendant by highlighting the amount of force required to cause Thompson's injuries, thereby further supporting an inference of defendant's intent to do great bodily harm. Defendant has established that trial counsel was ineffective for failing to call Thompson or Dr. Webber as a witness.

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor's remarks during rebuttal argument in which the prosecutor accused defendant of lying. Although defendant argues that it was improper for the prosecutor to call him a liar, a prosecutor properly may argue from the facts that a defendant is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Here, the prosecutor argued that defendant was lying when he stated in his video confession that he did not participate in the offense because the security video clearly showed otherwise. Because the prosecutor's remarks were made in reference to the evidence, they were not improper. Defense counsel was not ineffective for failing to object. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Jane E. Markey